**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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| In the Matter of | ) | |
| | ) | |
| Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c) | ) | CC Docket No. 01-338 |
| | ) | |

# OPPOSITION OF AT&T CORP.


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## OPPOSITION OF AT&T CORP.

Pursuant to the Commission's August 1, 2002 *Public Notice* in the above-captioned docket, AT&T Corp. ("AT&T") submits this Opposition to the Petition for Forbearance ("Petition") filed by Verizon. For the reasons explained below, Verizon's Petition should be denied.

## INTRODUCTION AND SUMMARY

Verizon's Petition is a baseless and overreaching request that the Commission apply section 10 of the Communications Act to forbear from enforcing portions of the section 271 "competitive checklist." *See* 47 U.S.C. §§ 160(a) & (d); 271(c)(2)(B). The Commission has no authority to grant such a request, because as section 271(d)(4) makes clear, the Commission "may not," either by rule "or otherwise," limit the terms of the competitive checklist. 47 U.S.C. § 271(d)(4). And even if that were not the case, Congress singled out sections 251(c) and 271 for special protection from forbearance, and expressly stated that "the Commission may not forbear from applying the requirements of section 251(c) or 271 of this title under subsection (a) of this requirements until it determines that those sections have been fully implemented." 47 U.S.C. § 160(d). There is properly no more stringent standard in the Act than the standard for forbearance from section 271, and Verizon's Petition does not remotely satisfy that standard.

Indeed, Verizon's Petition is as brazen as it is frivolous. In the Triennial Review, Verizon already seeks radical de-listing of virtually all unbundled network elements, including the complete de-listing of switching, signaling, dedicated transport and high-capacity loops. The record in the Triennial Review overwhelmingly demonstrates that competitors remain "impaired" without access to these elements, and that such radical de-listing would be wholly inappropriate. As Verizon implicitly recognizes, however, even if these elements are removed from the national unbundled network element ("UNE") list, section 271 would require Verizon to continue to offer access to these elements (albeit not necessarily at TELRIC-based rates). *See UNE Remand Order*, 15 FCC Rcd. 3696, ¶ 468 (1999) (finding that Bell operating companies ("BOCs") must continue to provide switching and shared transport notwithstanding the Commission's partial de-listing of those elements). Thus, the only conceivable purpose of Verizon's Petition is to obtain the authority to withdraw access to its facilities *completely*, regardless of price, at Verizon's whim.

Such forbearance would be inappropriate, precisely because such relief would have severe anticompetitive consequences. Thus, Verizon's request should be summarily rejected. Neither Verizon nor any of the other Bells has ever claimed – nor could they – that competitive local exchange carriers ("CLECs") have achieved ubiquitous bypass of incumbent local exchange carrier ("ILEC") facilities or anything close to it. To the contrary, Verizon and the other BOCs have repeatedly argued that CLECs are not "impaired" in their ability to provide service without various UNEs because they can still obtain access to the ILEC's facilities at "market-based" rates. As the evidence – and the Bells' concessions – make clear, the complete withdrawal of access would completely eliminate CLECs' ability to provide service at all in many cases. Accordingly, even if the Commission had authority to forbear from the competitive checklist, Verizon has not come close to satisfying the stringent statutory prerequisites for forbearance established in section 10(a) and 10(d).[1]

## ARGUMENT

### I. BECAUSE CLECS REMAIN IMPAIRED WITH RESPECT TO THE ELEMENTS AT ISSUE, VERIZON'S PETITION SHOULD BE DISMISSED AS MOOT.

At the outset, it must be emphasized that Verizon's Petition should be dismissed as moot, because the entire Petition is based on the erroneous assumption that competitive carriers would not be "impaired" without access to high-capacity loops, dedicated transport, switching and signaling. AT&T and other commenters – including virtually all State commission commenters – have shown in detail that competitors would indeed be impaired without access to these elements and that they should thus be retained. Accordingly, the Commission should not remove these elements from the national UNE list at this time, and Verizon's Petition should be summarily dismissed as moot.

For example, with respect to dedicated transport and "high-capacity" loops, Verizon merely repeats its simplistic claim that CLECs have deployed *some* alternative fiber in *some* locations. *See* Petition at 4, nn. 13 & 14. But even if this were sufficient to relieve ILECs of the obligation to provide such UNEs in some circumstances – and it clearly is not – this clearly does

[1] Verizon's Petition is also a frivolous attempt to salvage a transparently meritless argument included in its comments in the Triennial Review. There, Verizon argued that if the Commission removed an unbundled network element ("UNE") from the current national list, it should also find that the "corresponding" section 271 checklist item is automatically satisfied. Verizon Comments at 66-67. That argument is foreclosed by the plain language of the statute. Section 271 requires that before a BOC can be permitted into the long distance market in an in-region state, it must not only provide UNEs in accordance with section 251(c)(3), but it must also show that it provides access to the network facilities specifically listed in section 271(c)(2)(B). Thus, even if the Commission finds that competitive carriers are not "impaired" without access to a particular UNE for purposes of section 251(c)(3), section 271 imposes an *independent* obligation upon the BOCs to provide loops, transport, switching, and signaling capabilities as a pre-condition for in-region long distance authority. *See UNE Remand Order* ¶¶ 468.

not support a claim that CLECs are not impaired *any*where and that the Commission should forbear generally, as Verizon suggests. In fact, it is indisputable that dedicated transport and "high-capacity" loops are characterized by extremely high fixed costs, and that the ILECs' per-unit costs for their transport and loop facilities are far lower than any CLEC can achieve except in the most unusual cases. These facilities also are characterized by substantial sunk costs, making it very risky for CLECs to deploy facilities in competition with incumbents. As the D.C. Circuit recognized, such circumstances represent the classic case of "impairment." *See USTA v. FCC*, 290 F.3d 415, 426-27 (D.C. Cir. 2002). Verizon has never rebutted these showings, *see* AT&T Reply Comments at 148-65, 244-55, nor can it do so.

Similarly, Verizon's "showing" on switches is a simple recitation of switches deployed (and Verizon's estimates are substantially overstated, *see* AT&T Reply Comments at 347-52 & Pfau Reply Dec. ¶¶ 11, 17-22).[2] But the data upon which Verizon rely are not dispositive as to whether competitive carriers are impaired in serving customers connected to voice grade loops. Carriers that have deployed their own switches use them almost exclusively to serve customers that are connected to DS1 and higher bandwidth loops. The reasons for this are simple. Whenever a CLEC wants to use its own switch to provide service to a customer served by a DS0 loop, it must arrange to have the incumbent perform a "hot cut" – *i.e.*, break the existing "hardwired" connection between the incumbent's switch and customer's loop and establish an extended connection to the competitive carrier's switch. This, in turn, requires the CLEC to

[2] Verizon also cites data regarding competitive LEC deployment of packet switches and packet-based networks, but as explained in the declaration of Larry A. Russell attached to AT&T's Reply Comments, packet switches are used to *complement* existing circuit switch networks, not to replace them, Russell Reply Dec. ¶ 7, because, among other things, packet switches are not designed to provide the full suite of features that consumers demand from voice services. *Id.* ¶¶ 7, 10-15.

incur substantial expenses for (1) collocation; (2) transmission equipment; and (3) transport facilities, *none of which* the ILEC faces. Indeed, the CLEC must incur all of these costs, as well as the ILEC's non-recurring charges for hot cuts, *solely* to replace the connectivity supplied by a simple cross-connect across the ILEC's main distribution frame. Further, the ILECs' existing manual hot-cut processes provide CLECs with inherently inferior access to voice-grade loops and prevent them from providing their customers with services equal in quality to the incumbents'. Until CLECs are able to enjoy comparable costs to the ILEC and the manual hot cut process is replaced with an effective form of electronic loop provisioning, competitive carriers will be impaired without access to unbundled switching to provide service to customers served by voice-grade loops.

## II. FORBEARANCE WOULD BE INCONSISTENT WITH THE ACT.

In all events, Verizon's Petition fails on its own merits. According to Verizon, "perpetuating the availability of facilities after they no longer satisfy the Section 251(d)(2) test would frustrate achievement of Congress's primary goal" and the relief it seeks is therefore "necessary to avoid setting Section 251(d)(2) and 271 in conflict with on another." Petition at 6. This is manifest nonsense. These provisions impose independent and complementary obligations. Moreover, the Commission has no authority to forbear from these separate requirements, and even if it did, Verizon cannot satisfy the statutory prerequisites for such forbearance.[3]

[3] In this regard, it should be noted that petitions for forbearance from section 271 are not governed by the general rule in section 10(c) that forbearance petitions are deemed granted if they are not acted upon within one year. *See* 47 U.S.C. § 160(c). Section 10(d) expressly states that the Commission may not forbear from section 271 until it makes an affirmative determination that the requirements of that section have been "fully implemented," and the Commission obviously cannot make such a determination through inaction.

1. The section 271 checklist requires a BOC *both* to provide UNEs in accordance with 251(c)(3) (checklist item two) *and* to provide access to the specific facilities listed in checklist items four, five, six, and ten. *See* 47 U.S.C. § 271(c)(2)(B)(ii), (iv), (v), (vi), & (x). In other words, Congress intended the BOCs to continue to provide access to these facilities, *even if* the Commission were to find a lack of impairment under section 251(d)(2). Moreover, the terms and conditions of access differ under these two statutory provisions. Section 251(c)(3) provides potentially broader network access, because it applies to all ILECs, and it requires that UNEs be made available at any technically feasible point and at cost-based rates set according to section 252(d)(1). Section 271(c)(2)(B) applies only to the BOCs and requires only access to a specific core group of elements, and "the applicable prices, terms and conditions for that element are determined in accordance with sections 201(b) and 202(a)." *UNE Remand Order* ¶ 470. Further, a BOC can effectively "opt-out" of providing section 271-mandated access if it chooses not to seek long distance authority in an in-region state; however, section 251(c)(3) is mandatory for all incumbent carriers.

Thus, Verizon's hypothesized "conflict" is illusory. Congress adopted two different access regimes that provide for access under different terms and conditions. Although the Commission may remove a UNE from the national list for purposes of section 251(c)(3) upon a showing a lack of impairment under section 251(d)(2), Congress *prohibited* the Commission from eliminating general access to the specific facilities listed in section 271(c)(2)(B) until the BOC satisfies the far more stringent standard for forbearance from section 271. Indeed, Congress recognized the particular dangers inherent in a BOC's provision of in-region long distance, and therefore in section 271 it established a "safety net" of network facilities that must be made available to competitive carriers as a pre-condition for BOC long distance authority.

Moreover, section 271(d)(6) directs the Commission to continue to enforce the requirements of section 271, including the checklist, after a BOC has been granted in-region long distance authority. This clearly indicates Congress' intent to require the checklist obligations – which are necessary for opening the BOCs' monopoly local markets to competition – to remain in place after a BOC's application is granted. Finally, Congress emphasized the necessity of continuing access to these facilities by enacting a special provision circumscribing the Commission's ability to forbear from such requirements under section 10.

In stark contrast, Verizon's reading of the statute is incoherent. *Cf.* Petition at 6. Under Verizon's reading of the Act, the additional access requirements contained in section 271 are -- contrary to established law -- merely superfluous. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (statutes should be interpreted to give effect to every provision); *Moskal v. United States*, 498 U.S. 103, 109-111 (1990) (same). Under Verizon's theory, the additional network access requirements in section 271 would never have any practical or legal effect: access under section 271(c)(2)(B) would be unnecessary if there is a corresponding UNE under section 251(c)(3), but such access would be automatically eliminated once the corresponding UNE is de-listed under section 251(c)(3). AT&T's reading of the Act, on the other hand, gives independent meaning to both provisions, as well as the Commission's continuing enforcement authority under section 271(d)(6).

In short, even if – contrary to the extensive factual record in the Triennial Review – the Commission were to find that CLECs are not impaired with respect to a particular UNE, that finding could only have implications for implementation of checklist item two, which requires BOCs to provide access to network elements in accordance with sections 251(c)(3) and

252(d)(1). It would not alter the BOCs' *independent* obligation to provide access to specific network functionalities in accordance with checklist items four, five, six, and ten.

2. Nor can Verizon satisfy the prerequisites for forbearance from section 271. To begin with, the plain language of the Act establishes that the Commission has no authority to forbear from enforcing the competitive checklist. Section 271(d)(4) expressly states that "[t]he Commission *may not*, by rule *or otherwise*, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B)." 47 U.S.C. § 271(d)(4) (emphasis added). This specific provision trumps the more general provisions of section 10. *See, e.g., Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 524-26 (1989) (a specific statutory provision trumps a more general one). Notwithstanding its general authority to forbear from provisions of the Act, the Commission "may not" use forbearance to limit the terms of the competitive checklist, which is indisputably what Verizon seeks in its Petition. By its plain terms, section 271(d)(4) ensures that, as long as a BOC offers (or intends to offer) interLATA service, it must comply with an irreducible core of network access requirements.

Even if the Commission had authority to forbear from enforcing the checklist, Verizon cannot satisfy any of the four statutory requirements for forbearance in sections 10(a) and 10(d). First, enforcement of the additional checklist items would remain vitally necessary to ensure that Verizon's charges and practices are "just and reasonable" and "not unjustly or unreasonably discriminatory." *See* 47 U.S.C. § 160(a)(1). The *complete withdrawal* of access to these facilities would be patently unreasonable, discriminatory, and anticompetitive. Indeed, Verizon and the other BOCs have repeatedly conceded in the Triennial Review proceeding that continuing access to their facilities is necessary for local competition.

In particular, one of the BOCs' principal justifications for de-listing the transmission UNEs at issue here is that CLECs can continue to purchase BOC "services" at "market rates." *See, e.g.*, Verizon Comments at 11-12, 119-20. Similarly, the BOCs' consistent response to AT&T's arguments about the critical role that UNEs play in allowing competitive carriers to overcome sunk cost entry barriers is to tout their willingness to sell competitive carriers access at unregulated "market" rates. In responding to AT&T's argument that competitors need access to UNEs because customers will not wait the significant time it takes to extend their transmission networks due to delays incurred in obtaining the necessary rights-of-way, Verizon contended that "to mitigate any delay while deploying facilities, CLECs can provide services by obtaining ILEC special access channel terminations at competitively disciplined rates." Verizon Reply Comments at 95. SBC likewise argued that "ILEC special access services are available to serve as a bridge while alternative facilities are biding deployed" and that "a CLEC can buy capacity from the ILEC as a service . . . while it builds a customer base over which to spread the costs of deploying facilities." SBC Reply Comments at 147, 149. But the only point of Verizon's filing is to give Verizon and the other BOCs the ability to *completely eliminate* such options – and with them the BOCs' purported basis for asserting that competitive carriers are not impaired in self-deploying facilities.[4]

[4] Verizon's incentives argument vividly illustrates why it cannot be assumed that the mere de-listing of a UNE means there is a vibrant wholesale market for that element. Verizon's Petition repeats its argument that mandating access to its network under section 271(c)(2)(B) diminishes its incentives to invest, particularly in broadband technologies. Petition at 5-6. But, based on this same theory, Verizon and the other BOCs cite to section 251(d)(2)'s "at a minimum" language and contend that competitive LECs should be denied access to UNEs for other reasons *even when they are "impaired."* SBC Reply Comments at 50-51, 96-104; Verizon Reply Comments at 47-50. In such a situation, there could be no argument that incumbent LECs face effective competition and that section 271 has been fully implemented.

Verizon's further argument that forced "sharing" of facilities at "market-based" rates discourages

(continued . . .)

Nor can Verizon satisfy the second or third parts of the forbearance test – *i.e.*, whether enforcement is no longer necessary for "the protection of consumers" and "is consistent with the public interest." 47 U.S.C. § 160(a)(2) & (3). Indeed, it is obvious that the complete withdrawal of access to the identified network functionalities, even at market prices, would cause severe competitive disruptions that would be injurious to consumers and contrary to the public interest. Verizon's own data clearly demonstrate this point. Verizon and the other Bells have never claimed (nor could they) that CLECs have established *ubiquitous* bypass of the ILECs' facilities. Therefore, complete withdrawal of access to ILEC facilities would leave CLECs with no means of offering service in a huge number of cases.

For example, there are almost 8 million UNE-P customers nationwide, and as AT&T has demonstrated, CLECs are rarely able to use their own switches to offer service over voice grade loops because of, *inter alia*, the severe difficulties associated with the ILECs' manual hot cut process. Accordingly, complete withdrawal of access to switching and signaling would strand 8 million CLEC customers and would leave CLECs with no economic means of offering competitive service to residential customers – a result that is clearly odds with the public interest and the protection of consumers.[5] Similarly, where CLECs have deployed their own switches to serve business customers, they must still rely to a great extent on ILEC-provided high-capacity

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(. . . continued)
broadband investment, Petition at 6, is frivolous, because Verizon's own economists *concede* that "properly calculated" TELRIC-based rates would ensure adequate incentives. *See* Verizon Reply Comments, Kahn-Tardiff Reply Dec. ¶ 40 n.52; *see also* SBC Reply Comments at 13 n.31 ("[m]arket-based prices . . . will not discourage investment by either CLECs or ILECs"). And this argument is also irrelevant here, because the purpose of Verizon's Petition is to gain the ability to deny all access to ILEC facilities *at any price*.

[5] It is no answer to say that CLECs can use "resale" to serve these customers as it is now clear that resale is not economically viable. *See* AT&T Comments at 224 & Huels Dec. ¶¶ 22-25.

loops and transport to reach those customers. *See, e.g.*, AT&T Comments at 149-50. In short, the evidence establishes that there are many parts of the country where CLECs have deployed no facilities and would have no way to provide service to end-users other than by leasing access to incumbent networks. The ability to completely withdraw access to ILEC facilities, therefore, would leave these CLECs with no means of reaching the vast majority of the market and would strand existing investment in facilities – a result plainly contrary to the public interest.

Finally, Congress established a higher standard for forbearance from section 271 in section 10(d), which prohibits the Commission from forbearing from section 271 until that section has been "fully implemented." Verizon's interpretation of section 10(d) would drain that provision of any meaning. For example, Verizon's suggestion (Petition at 3 n.8 & 7) that the Commission could deem section 271 "fully implemented" before Verizon has even *applied* for interLATA authority in a state is simply preposterous. Verizon's further claim that section 271 could be deemed fully implemented as soon as interLATA authority has been granted is equally nonsensical. In essence, Verizon is claiming that as soon as it has shown that it has satisfied the checklist and "open[ed] the market to competition" (Petition at 7), the prerequisites for forbearance are satisfied and Verizon may then close the market again the day after interLATA entry is granted.

But there are numerous indications in the statute that Congress intended the standard set forth in section 10(d) to be extremely stringent. For example, Congress clearly contemplated that the checklist would continue to apply *after* a BOC obtains interLATA authority, because it expressly directed the Commission to establish procedures for enforcing the checklist after interLATA entry. *See* 47 U.S.C. § 271(d)(6)(A) (if at any time after interLATA entry the Commission determines that a BOC "has ceased to meet any of the conditions required for [interLATA authority]," the Commission can impose any number of penalties, including revocation of the approval). Similarly, Congress specified that a BOC must continue to comply with the section 272 affiliate requirements for at least three years after receiving interLATA authority, and it is implausible to contend that section 10(d) permits a more lenient standard for forbearance from the checklist. The phrase "fully implemented" in section 10(d) could only mean that the provision has fully *and finally* achieved all of its purposes – *i.e.*, the checklist could not be deemed "fully implemented" until, at a minimum, wholesale alternatives to the ILECs facilities were ubiquitous and cost-based, and the BOCs could no longer be deemed dominant in the local services market. That is not remotely the case today.

In all events, Verizon's sweeping request for national forbearance must be denied because the relevant markets are *local*, and Verizon has utterly failed to demonstrate the existence of numerous wholesale alternatives in each and every relevant local market in the country with respect to each element that it now seeks authority from the Commission to withhold from CLECs. For example, because the relevant market for dedicated transport is point-to-point, to demonstrate non-dominance, Verizon must show the existence of wholesale alternatives and cost-based transport rates for each and every point-to-point route in the country. Verizon, of course, does not even attempt to make such a showing.

## CONCLUSION

For the foregoing reasons, the Commission should deny the Petition.

Respectfully submitted,

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September 3, 2002

## CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September, 2002, I caused true and correct copies of the forgoing Opposition of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: September 3, 2002
Washington, D.C.

/s/ Peter M. Andros
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